

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1276

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

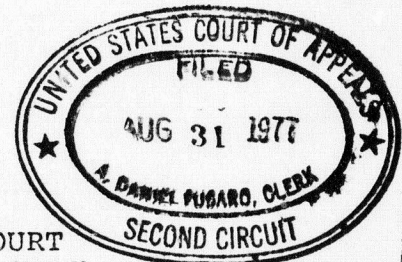
TON YOW HOM, a/k/a
TOM YEW HOM,

Defendant-Appellant.
-----X

Docket No. 77-1276

BRIEF FOR APPELLANT
TON YOW HOM

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether the Government failed as a matter of law to meet its burden of proving beyond a reasonable doubt that appellant Hom was predisposed to commit the crimes induced by a Government informer.
2. Whether the Government's reliance upon misleading hearsay and double hearsay testimony before the grand jury requires a dismissal of the indictment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Morris E. Lasker) rendered on June 17, 1977, after a jury trial, convicting appellant of two counts of unlawful distribution of heroin (21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A)). Appellant was sentenced to concurrent terms of 18 months and a special parole term of three years. Appellant is currently on bail pending the determination of this appeal.

By order of this Court dated June 24, 1977, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Hom was indicted (77 Cr. 88)* for the crimes of distributing heroin on February 27 and March 19, 1976. The sales were allegedly made to Lock Kar Shing (hereinafter "Lock"), a Government informer, who was the key witness at trial.

A. The Drug Transactions

Lock came to this country illegally and had a history of

*The indictment is B to the separate appendix to appellant's brief.

heroin and opium use. Though he eventually sought methadone treatment, Lock claimed that he was never addicted (227, 257, 260-261).^{*} During 1972, he kept two unlicensed guns in his house "to decorate on the wall" (sic) (262-263). Lock had been convicted of selling heroin in 1973 but he claimed he had just been a middle-man in the two transactions; the Government stipulated that he was lying about his participation in the crime (270-271, 390, 481). After serving two years of a four year federal prison sentence, Lock was transferred to the custody of the Department of Immigration, where he believed he was awaiting deportation (204-205).

James Kibble, a special agent of the Drug Enforcement Administration, visited Lock at the jail and told him that if he did not cooperate with the authorities he would probably be deported (206-207, 275).^{**} At the second meeting with Agent Kibble, Lock agreed to seek information and to "stimulate" narcotics transactions and he was released in October or November, 1975 (90-91, 206-207).

Lock obtained employment in a gambling house in Chinatown in which appellant also worked; the two had known each other for

^{*}Numerals refer to the transcript of trial, dated April 20-27, 1977.

^{**}Kibble learned that it was unlikely that Lock could have been deported, since his country of origin was mainland China, but he never told the informer of this fact (30, 87-88, 101).

six or seven years (209-210). Sometime around Christmas, 1975 or the following month, Lock began asking appellant to sell him heroin for a friend of his who wanted to buy (211, 317). He persisted in these requests, invoking his long-standing friendship with appellant. After Lock had raised the issue "[m]aybe eight times, ten times" over a period of several months, appellant acquiesced (321, 214).^{*} Though Lock admitted that he "worked very hard" to induce the sale, he asserted that he "didn't have to persuade [appellant] if he is not willing to. If he wants to sell, he can sell" (322).

On February 27, and March 19, 1976, Lock claimed that appellant sold him quantities of one and three ounces of heroin, respectively. Prior to each transaction, Lock met Agents Kibble and Toal on Centre Street in the mid-afternoon. In their car, which was parked across the street from the Criminal Court building, the agents conducted a full search of the informer -- squeezing every part of his body (215-216, 282, 117-119, 324-325; see also 370). Kibble installed a Nagra recorder on Lock and sent him into 70 Bayard Street, the apartment building at which appellant lived. On February 27, Lock was sent into the

^{*}Lock first indicated that appellant had agreed to sell him drugs at the informer's first request (211-212). However, Lock corrected himself on direct examination, stating that he could not recall when an agreement had been reached, only when the sale was transacted (214). That no agreement was reached before the end of February 1976 is supported by Agent Kibble's testimony that Lock did not tell him that he could arrange a sale with appellant until late February (32-33).

building with \$3,000 and returned with the narcotics (35-39). On March 19, he first obtained the heroin and brought it to the agents and then went back to the building with the money (53-55, 73-74). Between the dates of the two transactions, the agents observed appellant in the informer's company at a coffee shop (49-50, 392-393). Photographs taken on that occasion showed only appellant (110).

The informer claimed that he discussed with appellant a future transaction for six or seven ounces of heroin, which appellant said he could supply (243-245). However, after March 19, Lock engaged in no further transactions with appellant and told the agents that appellant could not provide greater amounts than he had previously supplied (169). During 1976, the Drug Enforcement Administration paid the informer a total of \$700 for his work on appellant's case; he earned \$525 for his activities against several other individuals (410-411).

B. The Grand Jury Proceeding

Appellant was arrested for the two transactions on January 31, 1977* and was indicted on February 9, 1977. Agent Kibble, who was the sole witness at the Grand Jury, testified about his conversations with Lock regarding the two drug sales.** At trial,

*Of the money in appellant's possession at the time of his arrest, none of the bills was among those used in the two drug transactions (166-167).

**The text of the Grand Jury proceeding, dated February 8, 1977, is D to the separate appendix to appellant's brief.

it was revealed that the agent spoke no Chinese and the informer spoke virtually no English. The two had difficulty communicating with each other -- they spoke in broken English and had to resort to hand and body gestures (142-143, 268). In a courtroom demonstration all the informer understood in a question posed in carefully enunciated English was the word "heroin" (269). Agent Kibble recalled that he had to obtain the services of an interpreter to communicate with the informer on at least eight or ten occasions (143-144). Lock first denied that the interpreter had ever been present when he told Kibble about his dealings with appellant, but later was not sure (267, 309). Kibble had listened to the tapes of Lock's conversations with the drug seller, but since they were in Chinese the agent could not understand them. He did not obtain a translation* until the month after the Grand Jury proceeding (114).

During trial, the defense filed a written motion to dismiss the indictment on the ground that the Grand Jury had been "impermissibly misled by unreliable hearsay and double hearsay." Though the court denied the motion, Judge Lasker "recommend[ed] most forcefully to the United States Attorney's office that in the future, where a witness testifies before a Grand Jury as to

*The tape recordings of Lock's conversations with the drug seller were introduced into evidence at trial along with the translations (177, 395). An interpreter (who was not an expert in voice identification) rendered her opinion that, based upon hearing a sample of appellant's voice, his was the second voice on the tape (188-189, 192).

conversations which have taken place through an interpreter, that he make it clear to the Grand Jury that that is the case, just as the United States Attorney is required to make it clear to the jury when hearsay is involved" (530-531).*

C. Verdict and Sentence

The jury found appellant guilty of both counts. On June 17, 1977, appellant Hom, a 54 year old American citizen with no prior record, was sentenced to concurrent prison terms of 18 months to be followed by a special parole term of three years.

*The Court's oral opinion denying the motion to dismiss the indictment as well as the motion to set aside the verdict is E to the separate appendix to appellant's brief. The Court's charge is C to the appendix.

ARGUMENT

POINT I

THE GOVERNMENT FAILED AS A MATTER OF LAW TO MEET ITS BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT APPELLANT HOM WAS PREDISPOSED TO COMMIT THE CRIMES INDUCED BY A GOVERNMENT INFORMER.

The undisputed testimony of Lock, the Government informer, establishes that to avoid what he believed was imminent deportation, he "worked very hard" to induce appellant to sell him heroin. The informer raised the subject "[m]aybe eight times, ten times" over a period of two months, finally invoking his long-standing friendship of six years to convince appellant to engage in a criminal act. Since the Government failed to introduce evidence that appellant was other than an innocent person whom the informer had corrupted, "the evidence of predisposition was too scanty to support a conviction by reasonable jurors." United States v. Steinberg, 551 F.2d 510, 514 (2d Cir. 1977).

The informer's testimony provided "some evidence of Government initiation of the illegal conduct" (United States v. Martinez-Carcano, Doc. No. 77-1041, slip op. 4325, 4330 (2d Cir. June 21, 1977)), sufficient to fulfill the defendant's initial burden on the issue of entrapment. Therupon the burden shifted to the Government to prove beyond a reasonable doubt that the defendant had a predisposition to commit the crime. United States v. Martinez-Carcano, supra, slip op. at 4330; United States v.

Steinberg, supra at 514; United States v. Swiderski, 539 F.2d 854, 857 (2d Cir. 1976); United States v. Rosner, 485 F.2d 1213, 1221-1222 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974).

The prosecution failed to sustain its burden by introducing evidence showing either

- (1) an existing course of criminal conduct similar to the crime for which defendant is charged,
- (2) an already formed design on the part of the accused to commit the crime for which he is charged, or
- (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement.

United States v. Viviano,
437 F.2d 295, 299 (2d Cir.
1971).

The record is barren of similar act evidence and, with respect to the second and third categories, the proof at trial indicates an absence of a previously formed design to sell drugs and an unwillingness to commit the crime charged. Unlike the defendants in United States v. Steinberg, supra, 551 F.2d at 514, who expressed a desire to engage in criminal behavior from their first meetings with the Government agents, there is no showing that appellant Hom agreed to sell an ounce of heroin until the issue was raised by the informer on eight or ten occasions. The informer's testimony hardly depicts appellant as one who was "ready and willing without persuasion" or was "awaiting any propitious opportunity to commit the offense." United States v.

Licursi, 525 F.2d 1164, 1168 (2d Cir. 1975). On the contrary, it was only after a two month campaign of seduction during which the informer invoked his six year friendship with appellant did the latter submit to Lock's requests. That the Government agent had to use this sort of pressure to induce the crime indicates an unwillingness to respond to the informer's entreaties. See United States v. Viviano, supra at 299 n.2.

In opposing appellant's motion to set aside the verdict in the court below, the only evidence the Government could muster to show propensity was the following excerpt from the informer's testimony:

"Q. Did you tell him that it was very important for you that you should satisfy your friend?

A. No, I did not say. If he is not willing, I cannot buy from him.

Q. Did you try to persuade him to become willing.

A. I didn't have to persuade him if he is not willing to. If he wants to sell he can sell."

(Tr. 321-322).

This testimony is nothing more than the self-serving opinion of the informer that he did not have to persuade appellant to sell the narcotics. This opinion evidence is explicitly contradicted by Lock's own version of the facts of the case -- i.e., his efforts over an extended period of time to induce the transaction. Thus, the Government may have introduced proof that "the accused was shorn but [nothing at all to show] that he went all too

eagerly to the shearing shed." United States v. Jones, 473 F.2d 293, 294 n.1 (5th Cir. 1973).

On the facts proved by the Government, it has failed to produce sufficient evidence to establish that appellant Hom was predisposed to sell narcotics. Therefore, the court below erred in denying the defense motion to set aside the jury verdict.

POINT II

THE GOVERNMENT'S RELIANCE UPON MIS- LEADING HEARSAY AND DOUBLE HEARSAY TESTIMONY BEFORE THE GRAND JURY RE- QUIRES A DISMISSAL OF THE INDICTMENT.

The only witness to testify before the Grand Jury was Agent Kibble, who had neither been present at the alleged narcotics transactions nor observed them. Though the Grand Jury was informed of the hearsay nature of the testimony and its option of calling a witness with direct knowledge, it was given the mistaken impression that Kibble had obtained his information in an intelligible conversation with the informer. As the trial testimony of the Agent and informer revealed, they did not speak the same language and communicated through an interpreter or a combination of broken English and "pantomime" (143). This irregularity in the Grand Jury proceeding requires a dismissal of the indictment.

In United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972), this Court dismissed an indictment based upon hearsay evidence where the Grand Jury had been misled into thinking it was receiving eyewitness testimony. While an indictment may be based solely on hearsay (Costello v. United States, 350 U.S. 359 (1956)), such evidence should only be relied upon where "direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." United States v. Umans, 368 F.2d 725, 730 (2d Cir.

1966).^{*} In any event, the prosecutor is obligated to make the Grand Jury aware of the hearsay character of the evidence presented to it so that the Grand Jury could knowledgeably demand more probative evidence. United States v. Harrington, 490 F.2d 487, 489 (2d Cir. 1973).

The prosecutor in the instant case contravened the doctrine of Estepa by deceiving the Grand Jury as to the nature of the agent's testimony. While Kibble's testimony implies that he and Lock spoke the same language, the two in fact communicated through hand and body gestures or broken English and, when these methods failed (as occurred on eight or ten occasions), they resorted to the use of an interpreter. The informer's understanding of English was so limited that when asked in court, without the assistance of the interpreter (who had assisted him throughout the proceedings) on what date he bought an ounce of number 3 heroin from Mr. Hom, the only word Lock comprehended was "heroin" (269). If the Grand Jury had been told that the testimony of Agent Kibble was actually double hearsay or the result of what amounts to a game of charades with the informer, it could have knowledgeably asked for Lock to testify through a sworn interpreter.

Contrary to the Government's argument in the District Court,

^{*}The United States Attorney for the Southern District of New York, in fact, represented to this Court that at the Grand Jury witnesses with personal knowledge are relied upon wherever possible. United States v. Arcuri, 405 F.2d 691, 693 n.4 (2d Cir. 1968).

the information supplied to the agent by the informer was not "meager," but was the most crucial evidence in the case. The officer only knew from his own observations that Lock entered an apartment house on two occasions with sums of money the Government supplied and exited a short time later with narcotics. Without communicating with the informer, Kibble could have no idea of which apartment he had visited. The agent could not understand the language spoken on the Nagra tape recording or recognize the voice of the person with whom Lock conversed. In fact, at the time of the Grand Jury proceeding, Kibble had not even seen a translation of the dialogue. Agent Kibble's knowledge of the crime was even less than that of the Grand Jury witness in Estepa, supra at 1134, whose observations of the defendants were "limited and remote." Kibble had not seen appellant at all on the date of either transaction. Clearly, without the information supplied by Lock the Grand Jury could not indict.

As in Estepa, the Government misled the Grand Jury as to the nature of the evidence presented. Furthermore, at no time did the prosecution proffer an excuse for the failure to call a witness with direct knowledge of the crime. That the Government engaged in a slightly different deception than that utilized in Estepa hardly minimizes the error. The Grand Jury should have been told of the "shoddy merchandise" so that it could have asked for something better. Estepa, supra at 1137. The court below acknowledged the infirmity in the Grand Jury proceeding and criticized the prosecution. A more appropriate and effective remedy

is that utilized in Estepa -- a dismissal of the indictment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the indictment dismissed.

Respectfully submitted,

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August 31, 1977

CERTIFICATE OF SERVICE

August 31, 1977

I certify that a copy of this brief ~~and exhibits~~ has been mailed to the United States Attorney for the Southern District of New York.

Barry Bassis